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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD PERLMAN, Plaintiff and Appellant, v. VITRACOAT AMERICA, INC., Defendant and Respondent.	B192349 (Los Angeles County Super. Ct. No. PC034056)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Affirmed.

Richard Perlman, in pro. per.; C. Blake and Cara Blake for Plaintiff and Appellant.

Jenkens & Gilchrist, Michael R. Matthias, John J. Leonard and Nancy Inesta for Defendant and Respondent.

Plaintiff and appellant Richard Perlman appeals from an order granting terminating sanctions in favor of defendant and respondent Vitracoat America, Inc. Perlman contends: (1) the trial court should have found he was "disabled" within the meaning of the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et. seq.) (ADA) and unable to appear for his deposition; and (2) the trial court abused its discretion by imposing terminating sanctions. We find that Perlman waived his argument based on the ADA by failing to raise the issue in the trial court and there was no abuse of discretion. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Attempts to Schedule Deposition and Motion for Sanctions

On September 10, 2003, Perlman was admitted to a hospital for emergency treatment for a myocardial infarction. At that time, he began treatment with Dr. Samuel Kojoglanian. Perlman was hospitalized for the remainder of September 2003 as a result of diabetes. Twenty-five percent of Perlman's heart muscle remains functioning and his congestive heart failure requires daily medication and treatment.

In December 2003, Perlman filed a complaint *in propria persona* against several defendants, including Vitracoat. In November 2004, he filed the operative second amended complaint for fraudulent conveyance, violation of Civil Code section 3429 et seq., fraud, conversion, civil theft, and conspiracy.

On October 5, 2004, Vitracoat served a notice on Perlman setting his deposition for November 8, 2004. That month, Perlman moved temporarily to Atlanta, Georgia. On November 4, 2004, Perlman called Vitracoat's attorney, said he had moved to Georgia, and could not attend the deposition as scheduled. Vitracoat's attorney agreed to hold the deposition during early December 2004 and requested that Perlman provide dates when he would be available. Perlman failed to provide any dates. Vitracoat's attorney served

an amended notice setting Perlman's deposition for January 11, 2005. Perlman wrote a letter to Vitracoat objecting to the amount of notice given for the new date.

On January 6, 2005, Vitracoat filed a motion for an order compelling Perlman's deposition on February 3, 2005. On February 1, 2005, the trial court granted the motion. Shortly before the deposition was to commence, Perlman contacted Vitracoat's attorney and said he was unable to attend because he was in Atlanta. Vitracoat's attorney agreed not to seek sanctions under the court order if Perlman appeared for deposition the following week on February 7, 9, or 10. Perlman initially agreed. However, Perlman contacted Vitracoat's attorney the following week to say that he was still in Atlanta, in poor health, and unable to travel to Los Angeles.

Dr. Kojoglanian wrote a letter to Vitracoat explaining that Perlman was restricted from traveling over two hours unless there were special circumstances or adequate time to complete the travel, which Dr. Kojoglanian would have to approve prior to departure. In addition, Perlman was restricted from appearances exceeding two hours or other activities that would place Perlman in a position that would exert undue stress.

Vitracoat offered to take Perlman's deposition in Atlanta over a period of several days, limiting the time of each session, if Perlman paid reasonable travel expenses. The parties agreed to take the deposition in Atlanta on March 4, 2005. Vitracoat arranged for a local court reporter in Atlanta and made airplane and hotel reservations. Shortly before Vitracoat's attorney was to depart, Perlman contacted him and stated that he would be unable to have his deposition taken as scheduled. Another date was scheduled in Atlanta, which was subsequently cancelled when Perlman stated he could not attend. Vitracoat served an amended notice setting Perlman's deposition for August 31, 2005. Perlman raised objections and the deposition did not take place. Perlman did not provide any dates for which he was available for deposition in Atlanta or Los Angeles.

Vitracoat served an amended notice of deposition setting Perlman's deposition for March 3, 2006. On February 28, 2006, Perlman left a telephone message stating that he had just learned of the deposition and could not appear on the date scheduled. Perlman

did not answer his telephone the following day. Vitracoat faxed a letter to Perlman stating that the deposition notice had been properly served and reminding him that he had been ordered to appear for deposition. Vitracoat stated that it would seek sanctions for failing to comply with the order, including terminating sanctions.

On March 2, 2006, Perlman participated by telephone in the deposition of another party. During a break in the proceeding, Perlman and Vitracoat's attorney conferred on the issue of Perlman's deposition. Perlman stated that he would not appear on March 3, 2006, but did not have any objection to appearing in Los Angeles for his deposition the following week. Perlman said that he would call Vitracoat's attorney on Friday, March 3, 2006, to arrange a new deposition date. Vitracoat's attorney stated that he would proceed with the noticed deposition on March 3, 2006, obtain a certificate of nonappearance if Perlman did not attend, and file a motion for sanctions to protect Vitracoat's position. He stated that he would take the sanctions motion off-calendar if a date could be arranged and Perlman appeared for deposition.

Perlman did not appear for deposition on March 3, 2006, and a certificate of nonappearance was taken. Perlman failed to call Vitracoat's attorney that day to discuss an acceptable deposition date. Perlman called on March 6, 2006, but did not have a proposed date for his deposition. He agreed to call on March 8, 2006, with a deposition date, but did not contact Vitracoat's attorney again. On March 16, 2006, Vitracoat filed a motion for an order imposing terminating sanctions for failure to obey the order compelling Perlman to appear for deposition. The motion was scheduled to be heard on May 1, 2006. Discovery was required to be completed by May 5, 2006.

On April 17, 2006, Perlman attended a meeting with Vitracoat's attorney in Los Angeles to discuss the case. Perlman offered to have his deposition taken at the same time as another deposition scheduled for May 9, 2006. Vitracoat's attorney was willing to take Perlman's deposition prior to May 1, 2006, but refused to take the motion for terminating sanctions off-calendar.

Perlman retained counsel on April 27, 2006. Perlman's attorney contacted Vitracoat and attempted to schedule Perlman's deposition during the week of May 1, 2006. Perlman offered to stipulate that if Vitracoat did not get three hours of deposition testimony, he would dismiss the case. Vitracoat refused to schedule Perlman's deposition on the dates suggested or take the motion for terminating sanctions off-calendar.

Perlman's Opposition to Motion for Sanctions

On May 1, 2006, Perlman filed an ex parte application requesting permission for late filing of his response to the motion for terminating sanctions. In his proposed response, Perlman opposed the motion on the grounds that Vitracoat failed to properly meet and confer on the issue and Perlman believed the issue was resolved during the April 17, 2006 meeting. Perlman argued an agreement was made that Vitracoat would take his deposition at the same time as the individual scheduled to be deposed in May 2006. After April 17, 2006, Perlman became severely ill and could not file any pleadings.

Perlman submitted the declaration of Dr. Kojoglanian in support of his opposition to the motion. Dr. Kojoglanian provided Perlman's medical history, as described above. Dr. Kojoglanian declared that when Perlman returned from Atlanta to resume permanent residence in Los Angeles in March 2006, he caught a cold that caused severe respiratory congestion, edema, and other complications. Dr. Kojoglanian prescribed an antibiotic and increased the dosages of Perlman's diuretic. Another doctor advised Dr. Kojoglanian that Perlman's blood sugar levels were dangerously high, placing him at risk for stroke or heart attack. Dr. Kojoglanian restricted Perlman to bed rest with limited movement. In the second week of April, Dr. Kojoglanian relaxed these restrictions to allow Perlman to attend one meeting, but his condition relapsed. Dr. Kojoglanian restricted him to bed rest

from April 18 through 25, 2006, under increased medications. These restrictions made it impossible for Perlman to perform any work or appear at meetings.

Perlman submitted his declaration and the declaration of another individual who was present at the meeting in April 2006. They declared that Vitracoat agreed to take Perlman's deposition in May at the same time as the other scheduled deposition. Perlman believed this agreement resolved the sanctions issue, and therefore, he did not file a timely opposition to the motion for terminating sanctions.

Vitracoat's counsel provided a declaration in opposition to the ex parte application. A hearing was held on May 1, 2006. The trial court considered Perlman's late filed documents. The court found that Perlman's illness and bed rest restrictions in April 2006 did not address his failure to appear for deposition in the 14 months prior to and including March 3, 2006. Although Perlman had physical problems, there was no specificity with respect to the myriad dates previously scheduled that Perlman failed to attend for which no proper excuse was made. The court found Perlman was willfully noncompliant with the previously scheduled depositions and the opposition to the motion failed to address the period of time in question.

The trial court entered an order granting the motion to impose terminating sanctions for failure to comply with the court's order to appear for deposition. The second amended complaint was stricken and the action dismissed with prejudice. Perlman filed a timely notice of appeal from the order of dismissal.[1]

DISCUSSION

Terminating Sanctions

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[1] Apparently, on June 6, 2006, a judgment pursuant to stipulation of the parties was entered terminating related cross-actions and consolidated cases.

Perlman contends the trial court abused its discretion by imposing terminating sanctions. We disagree.

A trial court's choice of sanctions with respect to discovery matters is reviewed on appeal for abuse of discretion. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.) Under this standard, an appellate court will disturb a discretionary trial court ruling only upon a showing of a clear case of abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) Discretion is abused only when it can be shown that the trial court has "exceed[ed] the bounds of reason, all of the circumstances before it being considered." (*Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348; *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.)

Code of Civil Procedure section 2023.010 provides that sanctions may be imposed for a misuse of the discovery process, including "[f]ailing to respond or to submit to an authorized method of discovery" (*id*., subd. (d)); "[m]aking an evasive response to discovery" (*id*., subd. (f)); or "[d]isobeying a court order to provide discovery" (*id*., subd. (g)). A broad range of sanctions is available to the court, from monetary sanctions to terminating sanctions, including the ultimate sanction of "dismissing the action." (*Id*., § 2023.030, subd. (d)(3).)

On appeal, "'[T]he question before this court is not whether the trial court should have imposed a lesser sanction; rather the question is, whether the trial court abused its discretion by imposing the sanction it chose. . . . [Citation.]' [Citation.]" (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1620.) The propriety of terminating sanctions is determined by the totality of the circumstances, including the willfulness of the improper acts, the detriment to the propounding party, and the number of formal and informal attempts to obtain the discovery. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244-1246.)

In this case, the terminating sanction was appropriate. The trial court ordered Perlman to appear for deposition. There is no evidence that Perlman raised any health restrictions in opposition to the motion to compel his deposition. Vitracoat attempted to

accommodate Perlman's health and travel issues several times by scheduling the deposition on convenient dates in convenient locations. Perlman provided no excuse to the trial court for his failure to appear on multiple occasions between February 2005 and March 2006. Vitracoat was entitled to take Perlman's deposition, and Perlman's violation of the discovery order was willful. A plaintiff who selects the forum and files an action, but refuses to submit to a court-ordered deposition, should not be allowed to continue to maintain the action in that forum. The trial court did not find credible Perlman's claim that Vitracoat agreed to take his deposition on May 9, 2006, which would have been after the hearing date on the motion for sanctions and the cut-off date for discovery. The trial court did not abuse its discretion in issuing the terminating sanctions.

Disability Under the ADA

On appeal, Perlman contends the trial court should have found him to be disabled under the ADA, and therefore, excused from appearing for deposition. However, Perlman did not raise this argument in the trial court. Arguments not raised in the trial court may not be raised for the first time on appeal. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.) Perlman has waived his argument based on the ADA.

Moreover, Perlman never informed the trial court that his health prohibited him from appearing for deposition. In fact, the evidence showed Perlman could appear for deposition. Dr. Kojoglanian's declaration sets forth restrictions governing Perlman's appearance for deposition which Vitracoat agreed to accommodate. Perlman continually represented to Vitracoat that he was willing to have his deposition taken. Perlman's agreements to schedule his deposition with certain accommodations directly contradict his contention on appeal that the trial court should have found he was unable to appear and have his deposition taken.

DISPOSITION

The judgment is affirmed. Respondent Vitracoat America, Inc. is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.